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No. 446

IN THE

SUPREME COURT

OF THE

United States

October Term, 1953

ROBERT E. OVERMAN,
Petitioner,

v.

FRANK LOESSER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Robert E. Overman, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on June 26, 1953. A transcript of the record in the case, including the proceedings in said United States Court of Appeals, is furnished herewith in accordance with the rules of this Court.

OPINIONS BELOW

The opinion of the District Court (R. 837, 838) is unreported. The opinion of the Court of Appeals (R. 936-943.) is reported in 205 F. (2d) 521.

JURISDICTION

The judgment of the Court of Appeals was entered on June 26, 1953. A timely petition for rehearing was filed and denied by the Court of Appeals on August 5, 1953. (R. 945.) Jurisdiction of this Court is invoked under 28 USC, Sec. 1254 (1).

QUESTIONS PRESENTED

The questions presented are:

1. Where a plaintiff is invited by the defendant to make a disclosure of an unpatented invention, trade secret, unpublished composition, or the like, and the defendant thereafter without license from the plaintiff, proceeds to exploit the same or something highly similar thereto, and on being sued the defendant defends on the ground that he is only exploiting his own ideas and not those imparted to him, must the defendant prove his defense by evidence that is "clear satisfactory and beyond a reasonable doubt" as was held by the Fourth Circuit Court of Appeals in *Hoeltke v. Kemp,* 80 F. (2d) 912, certiorari denied, 298 U. S. 673, and *Ackermans v. General Motors,* 202 F. (2d) 642, certiorari de-

nied ..... U. S. ..... (June 15, 1953) or need the defendant only prove his defense by a preponderance of evidence which is the holding of the Trial Court herein standing approved by the Court of Appeals for the Ninth Circuit?

2. Where there is an implied confidential relationship between the plaintiff and the defendant created by the defendant inviting the disclosure is "the first thing to be made sure of" that "the defendant shall not fraudulently abuse the trust imposed in him. It is the usual incident of confidential relations." as held by this Court in *Dupont v. Masland,* 244 U. S. 100, or is it sufficient for the defendant to prove by a mere dubious preponderance of oral testimony that he has not abused the trust?

3. After the defendant has invited and received a disclosure from the plaintiff of an unpublished musical composition and thereafter proceeds to commercially exploit a highly similar musical composition, claiming to be the prior composer, must the defendant prove that he was in fact the prior composer by evidence that is "clear, satisfactory and beyond a reasonable doubt" or need he only produce a group of witnesses who testify that they heard him play the accused composition at an earlier date and unless the Trial Judge is able to hold *"all"* of them incredible, thus defeat plaintiff's claim?

4. Is a finding made by a Trial Court conclusive on appeal under Rule 52(a), Federal Rules of Civil Procedure, when such finding has been made by the

Trial Judge under the misapprehension that the law merely requires the defendant to establish his defense by a mere preponderance of evidence, whereas under the facts and circumstances of the case, the law requires the defendant to establish his defense by evidence that is "clear, satisfactory and beyond a reasonable doubt?"

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

The condensed statement of fact made in the opinion for the Court of Appeals for the Ninth Circuit is incomplete and is not in accurate conformity with the record. The facts of this case in chronological order are as follows:

Petitioner and plaintiff Overman met defendant Loesser in February 1946 (R. 42, 43).[1] At that time Loesser informed Overman that Loesser was about to organize a music publishing company in New York City. Loesser was informed that Overman had composed some pieces of music. Loesser invited Overman to submit some of his compositions for possible publication inasmuch as

> "in organizing his publishing company in New York, just getting started, he (Loesser) couldn't afford not to look over any and all music with the possibility of publishing it." (R. 45.)

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[1]The opinion of the Court of Appeals erroneously states that the meeting occurred in January 1947.

In April 1946, Loesser did organize his music publishing corporation under the name of Susan Publications, Inc. (Ex. 11.) This corporation ultimately printed and published the music that is alleged herein to infringe plaintiff's copyright.

During the summer of 1946, Overman, while in Los Angeles, telephoned Loesser and

> "asked him if he was serious about me submitting music to him at that time and he (Loesser) said, 'Yes, send it on out.'" (R. 46.)

During January 1947, T. Goodwin Lyon transmitted another inquiry from Loesser to Overman concerning the submission of some of Overman's compositions (R. 849.) This latter invitation was promptly accepted by Overman and piano scores and phonographic recordings of four of Overman's musical compositions were taken by Overman and Lyon to New York City and delivered to the office of Loesser's publisher pursuant to Loesser's instructions. (R. 48, 853.) Included in the package of piano scores and phonographic recordings was the piano score and phonographic recording of the song entitled "Wonderful You." It is the statutory copyright on this composition that it is alleged was infringed. The music for this song had been composed by Overman during the fall of 1946. The lyric was composed by Mrs. Betty Hawes whose interest in the song has been assigned to Overman. Just prior to delivery of Overman's music to Loesser's publishers

Overman sent his application to register the song as an unpublished musical composition to the Register of Copyrights. (R. 51.)

Loesser retained Overman's music from January 1947 until May 1947, and acknowledged to one witness Tiff, some of whose music was also included in the package, that he had brought the music from New York to Beverly Hills, California. (R. 879.) In May 1947, Mrs. Betty Hawes, the composer of the lyric to "Wonderful You" was told by Loesser's secretary in response to a telephoned inquiry that Loesser had "Wonderful You" on his desk in Beverly Hills (R. 902). Loesser returned Overman's music to him at Kansas City without comment or criticism in May 1947. (R. 66 et sec.)

During the summer of 1947, a lead sheet for the accused music entitled "On A Slow Boat to China" was prepared for Loesser by Gerald Dolin (R. 541.) On October 17, 1947, Jerry Phillips prepared a piano arrangement for Loesser from the lead sheet and had twenty-four copies prepared by Cameo Music Reproductions. (R. 350, Ex. 26.) In November 1947, licenses were issued to various phonographic record manufacturing companies to make records of the accused music. (Ex. 15-1 to 15-18 inclusive.) On May 7, 1948, Loesser obtained an unpublished copyright on the accused music entitled "On A Slow Boat to China." (Ex. 17 and 18.) On July 20, 1948, Loew's Inc. was licensed to use the defendant's accused music in a moving picture entitled "Neptune's Daughter," (Ex. 15-18.) During September 1948, the defendant's music was

published and a published copyright obtained thereon. The song quickly became a hit tune. On January 2, 1949, Overman heard the accused music on a radio broadcast and learned for the first time that the defendant Loesser claimed credit for composing it. (R. 75.) He caused an attorney, Walter K. Olds, to write a letter to Loesser asserting Overman's claim, which letter was received by Loesser but ignored by him. (R. 210.)

The Trial Judge has found for the plaintiff on the element of access. In fact, access is not seriously disputed by the defendant. As stated by his counsel (R. 168):

> "Our position, quite candidly is we neither deny nor admit that Mr. Loesser saw the manuscript or the recording which Mr. Overman claims to have submitted. Mr. Loesser has no recollection of having seen them."

R. 169:

> "Mr. Selvin: Neither deny nor admit. Mr. Loesser says he has no recollection of ever having seen it but as he said yesterday it is possible— he might have seen it."[3]

The Trial Judge concluded that the plaintiff's music and the defendant's music were "similar" (R. 837) after having heard the music played in open court,

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[3]The Court of Appeals opinion erroneously states that there was appellee's evidence "to the contrary" on the issue of access.

separately *and simultaneously.* (R. 264-267.) The Judges of the Court of Appeals also heard during the argument of this case before that Court a reproduction of the music, both separately and simultaneously as it was played before the trial court. The Court of Appeals has not seen fit to disturb the Trial Court's conclusion that the music of the defendant's song is similar to plaintiff's. The lyrics of the two songs are not involved.

The defense asserted by Loesser is that he composed the accused music "On a Slow Boat to China" during November 1945, some three months before he met the plaintiff. He has produced witnesses, each of whom has testified that at isolated times and places when no one else was present they individually heard the defendant play the accused music during 1946. This was before the plaintiff had composed the music for "Wonderful You." Their testimony is neither susceptible or corroboration nor contradiction. There is no contention that Overman could in any way have had access to Loesser's music, if Loesser's music was in fact in existence prior to Overman's composition.

Milton Delugg claims to have written a sketch of the accused music for Loesser in December 1945. Such sketch has been scrutinized by handwriting experts on both sides of this case and its date is incapable of being established by either one of them. The sketch, however, contains significant errors which indicates that the sketch was written long after the music had been published.

After having found for the plaintiff on the elements of access and similarity the Trial Judge hesitated to hold *"all"* of defendant's witnesses incredible and therefore concluded that on the issue of copying, the evidence *"preponderates* in favor of the defendant." His oral opinion rendered at the conclusion of four days and three nights of steady trial reads in part as follows: (R. 838)

> "I would also have to hold that each one of the witnesses produced by the defendant, some of whom, as I have indicated, taxed my credulity as I listened to their testimony, I would nevertheless have to hold that *all* of them were incredible in their testimony, and I would have to hold, as a matter of fact, that the failure of Dolin to have copied Exhibit H identically in the summer of 1947, when the testimony shows, without conflict, that he prepared Exhibit 14 (Dolin), that that would outweigh all of the direct evidence on the subject.
>
> "And for that reason I am constrained, and must, and do hold that on the third point the evidence *preponderates* in favor of the defendant, that there was no actual copying, and must therefore give judgment for the defendant." (Emphasis added.)

As copying is a mental act, plaintiff must of necessity rely upon circumstantial evidence. Here the plaintiff has proved access and similarity. These factors alone have been held in numerous cases to be "strong proof one was copied from the other."

Having received a disclosure of the plaintiff's music as a result of the defendant's repeated invitations and solicitations an implied confidential relationship was created between the plaintiff and the defendant. After the plaintiff has established access and similarity and thus the strong inference that the defendant copied the plaintiff's music, the defendant should not be permitted to defeat the plaintiff's case by presenting before a credulous judge a group of witnesses and defy the Judge to hold each and every one of them incredible. In this case, although some of the defendant's witnesses taxed the credulity of the judge, the defiance to hold "*all* of them" incredible has caused the Trial Judge to conclude that "the evidence preponderates in favor of the defendant" on the issue of copying.

In view of the invited disclosure and the confidential relationship thus created it should be necessary for the defendant to establish his defense that he is using only his own ideas and not those imparted to him by evidence that is "clear, satisfactory and beyond a reasonable doubt." This is the only way in which the Court can make sure that the defendant is not abusing the trust imposed in him.

The exact nature of the burden of proof imposed on the parties under these circumstances is the real question presented by this petition.

REASONS FOR GRANTING THE WRIT

1. PUBLIC IMPORTANCE.

Inventors, composers, authors and developers of trade secrets frequently do not have the financial means or the ability of commercially exploiting their ideas. Consequently, they frequently find it necessary to submit their ideas to some person or concern who has such means or ability. Progressive concerns invite such disclosures in the belief that of the many ideas submitted there may be something of value that can be commercially exploited to the benefit of all concerned.

There have been numerous instances, however, wherein the disclosee or recipient of the disclosure after having received the benefit of the disclosure has subsequently exploited the same or a highly similar idea without making just compensation to the discloser. A few of the numerous cases in which this situation has arisen are cited in the footnote.[4] Invariably in these cases the defense is that the exploiter or disclosee is not exploiting any of the ideas confidentially submitted to him but is only exploiting his own ideas which he developed independently.

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[4] *Smith v. Dravo Corp.*, 203 F. (2d) 369;
Northrop v. Reish, 200 F. (2d) 924;
Saco Lowell Shops v. Reynolds, 141 F. (2d) 587;
Conmor Products Co. v. Universal Slide Fastener Co., 172 F. (2d) 150;
Picard v. United Aircraft Corp., 128 F. (2d) 632;
Chesapeake & Ohio Ry. Co. v. Kaltenbach, 95 F. (2d) 801;
De Filippis v. Chrysler Corp., 53 F. Supp. 977, affirmed 159 F. (2d) 478;
Boothe v. Stutz, 56 G. (2d) 962;
Matarese v. Moore-McCormack Lines, 158 F. (2d) 631;
International Industries, Inc. v. Warren Petroleum Corp., 99 F. Supp. 907;
Jones v. Ulrich, 342 Ill. App. 16, 25.

The rule of law applicable to this situation was first announced in *Hoeltke v. Kemp*, 80 F. (2d) 912, as follows:

> " . . . one who admittedly receives a disclosure from an inventor, proceeds thereafter to manufacture articles of similar character, and, when called to account, makes answer that he was using his own ideas and not the ideas imparted to to him"

must prove his defense by evidence that is

> "clear, satisfactory and beyond a reasonable doubt."

This Court denied certiorari in *Hoeltke v. Kemp*, 298 U. S. 673.

Judge Parker who wrote the majority opinion in *Hoeltke v. Kemp* recently quoted this rule with approval in *Ackermans v. General Motors*, 202 F. (2d) 642.

Again this Court denied certiorari, ... U. S. ..... (June 15, 1953).

The case of *Hoeltke v. Kemp* has been cited in numerous District Court cases and Courts of Appeals cases in various circuits including

Picard v. United Aircraft Company (C. A. 2), 128 F. (2d) 632, 637;

Schreyer v. Casco Products Corp., 190 F. (2d) 921, 924, certiorari denied, 342 U. S. 913;

Lorenz v. Colgate Palmolive Peet Co. (C. A. 3), 167 F. (2d) 423, 426;

Chesapeake & Ohio R. R. Co. v. Kaltenbach (C. A. 4), 95 F. (2d) 801, 806;

Saco-Lowell Shops v. Reynolds (C. A. 4), 141 F. (2d) 587, 597;

Wilson v. Seng Co. (C. A. 7), 194 F. (2d) 399, 401;

Eckert v. Braun (C. A. 7), 155 F. (2d) 517, 519 (holding that the cases are uniform on the point);

Northrop v. Reish (C. A. 7), 200 F. (2d) 924, 928 (holding that the *Hoeltke* case was "sound");

Sandlin v. Johnson (C. A. 8), 152 F. (2d) 8, 11.

The opinion in *Hoeltke v. Kemp* unfortunately is expressed in two opinions, (1) the original opinion; and (2), the opinion on rehearing. The opinion on rehearing reads in part:

> ". . . One who invites the disclosure of an invention and thereafter begins to manufacture articles embodying the principle of the disclosure, labors under a heavy burden when he seeks to justify his action on the ground of independent invention, and he ought to offer something of greater weight than the verbal testimony of interested witnesses. . . ."

This has heretofore been regarded as but another way of expressing the same rule of law announced in

the original opinion, to wit, that the defense must be established by evidence that is "clear, satisfactory and beyond a reasonable doubt." Thus, in *Schreyer v. Casco Products Corp.*, 97 F. Supp. 159, 88 USPQ 515, 523, District Judge Smith quoted only from the original opinion as follows:

> ". . .'(O)ne who admittedly receives a disclosure from an inventor, proceeds thereafter to manufacture articles of similar character, and, when called to account, makes answer that he was using his own ideas and not the ideas imparted to him' should be required to sustain his defense with proof which is 'clear, satisfactory, and beyond a reasonable doubt', *Hoeltke v. C. M. Kemp Manufacturing Co., supra,* at 923."

The judge concluded that this burden of proof had not been carried by the defendant and found the defendant guilty of unfair competition. On appeal his decision on the issue of unfair competition was affirmed, *Schreyer v. Casco Products Corp.*, 190 F. (2d) 921. This Court denied *certiorari*, 342 U. S. 913.

In *Chesapeake & Ohio R. R. v. Kaltenbach*, 95 F. (2d) 801, (C.C.A. 4), Judge Northcott quoted only from the opinion on rehearing in the *Hoeltke* case concerning the nature of the burden of proof imposed on the defendant and concluded that the defendant had not carried the burden of proof and that Kaltenbach's ideas were "wrongfully appropriated."

The decision of the Court of Appeals for the Ninth Circuit rendered herein has the effect of unsettling what was heretofore regarded as an established principle of law. The Court of Appeals for the Ninth Circuit, instead of regarding the statements made in the rehearing opinion in *Hoeltk v. Kemp* as being but a mere rephrasing of the statements made in the original opinion said:

> "We believe that the broad statement as to proof 'beyond a reasonable doubt' (in the case of *Hoeltke v. Kemp)* must be read in connection with the court's statement on rehearing and should be considered *modified thereby.* We agree with the modification expressed in the opinion on rehearing . . . " (Emphasis added.)

To what extent the Court of Appeals for the Ninth Circuit regards the rule as having been modified is not clear. Apparently, the Court of Appeals for the Ninth Circuit is injecting into the law a new burden of proof, to wit, a "heavy burden". This presumably is something more than a mere preponderance of evidence but something less than evidence which is "clear, satisfactory and beyond a reasonable doubt". At all events, the suggestion that the broad statement as to proof "beyond a reasonable doubt" should be considered *modified* throws doubt on the rule heretofore thought to be settled and established.

Inventors, authors, and composers should be assured by this Court that they may submit their material

to financiers and publishers anywhere in the United States and that the courts uniformly throughout the United States will extend to them the same protection. That is, if the disclosee appropriates the idea submitted and defends on the ground that he thought of the idea first or that he is merely exploiting his own ideas, the Courts uniformly will require him to prove it beyond a reasonable doubt. As matters now stand, this is the rule in the Eastern Circuits. But if it is necessary for the plaintiff to sue such a defendant in the Ninth Circuit and after establishing a *prima facie* case of plagiarism the Trial Judge hesitates to find *all* of the defendant's witnesses incredible and therefore believes that the evidence *preponderates* in the defendant's favor the Court of Appeals for the Ninth Circuit will not come to the plaintiff's assistance. Consequently, under identical circumstances the inventor or composer will be protected in the Eastern part of the United States but not in the Western part. Equal protection through the entire nation is necessary. If inventors and authors are not adequately protected in disclosing their ideas they will not disclose. Their ideas and compositions may die with them and the public may suffer an irretrievable loss.

The economic desirability of fostering disclosures has been recognized by this Court. *Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co.*, 339 U. S. 605, wherein Mr. Justice Jackson said:

> ". . . One who seeks to pirate an invention, like one who seeks to pirate a copyrighted book

or play, may be expected to introduce minor variations to conceal and shelter the piracy. Outright and forthright duplication is a dull and very rare type of infringement. To prohibit no other would place the inventor at the mercy of verbalism and would be subordinating substance to form. It would deprive him of the benefit of his invention and *would foster concealment rather than disclosure* of inventions, which is one of the primary purposes of the patent system." (Emphasis added.)

2. THE DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT IS IN CONFLICT WITH THE DECISIONS IN OTHER CIRCUITS.

Herein the opinion of the Court of Appeals for the Ninth Circuit is that the "broad statement as to proof 'beyond a reasonable doubt' " in the original opinion of *Hoeltke v. Kemp* "must be read in connection with the court's statement on rehearing and should be considered *modified thereby.*"

Judge Parker, who wrote both opinions in *Hoeltke v. Kemp* and also the opinion in *Ackermans v. General Motors,* did not consider that he had modified the original opinion by his expressions made in the rehearing opinion. This is because he quoted from both of the *Hoeltke* opinions in *Ackermans v. General Motors.* If it had been his intention to modify the original *Hoeltke* opinion by the opinion on rehearing in the *Hoeltke* case, the statements in the original *Hoeltke*

opinion would have been regarded by him as obsolete or as inaccurately stating the law. Consequently, he would have quoted only from the rehearing opinion in the *Ackermans* case. He did not do so.

We believe that Judge Parker when he wrote the opinion on rehearing in the *Hoeltke* case intended to emphasize the rule announced in the original opinion rather than to modify it. Hence, the rule stated in the original opinion and the emphasis stated in the rehearing opinion are both quoted in the *Ackermans* case.

As matters now stand the Court of Appeals for the Ninth Circuit apparently believes that in a situation of this kind the burden of proof placed on the defendant is something less than proof "beyond a reasonable doubt," to wit, merely a "heavy burden." The District Judge herein ruled merely that the "evidence *preponderates* in favor of the defendant." As the District Court's decision stands affirmed by the decision of the Court of Appeals for the Ninth Circuit, the effect of the ruling is that a mere dubious preponderance of evidence on the part of the defendant satisfies all requirements. Consequently, a mere preponderance of evidence is held to meet the requirement of proof "beyond a reasonable doubt" which is the rule that *Hoeltke v. Kemp* really stands for.

Obviously a ruling as here by a Trial Judge who hesitates to hold *"all"* of defendant's witnesses incredible, and consequently does hold that "the evidence

preponderates in favor of the defendant" cannot meet the requirement that the evidence shall be "clear, satisfactory, and beyond a reasonable doubt." It cannot even meet the requirement "as modified." If a mere preponderance of evidence as found by the Trial Judge will suffice, then there is no rule. The rule of *Hoeltke v. Kemp* thus becomes emasculated until it amounts to nothing more than that the defendant shall prove his defense by a mere dubious preponderance of evidence. Here this preponderance is derived from a failure on the part of the plaintiff to prove *all* of defendant's witnesses incredible.

But in the *Ackermans* case as well as in the *Hoeltke* case, the Trial Judges found that the weight of the evidence preponderated in favor of the defendant. In the *Ackermans* case the Trial Judge so stated in no uncertain terms. The following is quoted from the Trial Court's opinion in the *Ackermans* case: (108 F. Supp. 368)

> "Counsel for plaintiff argues that in the present case he has proved that General Motors did rely upon his disclosure to it in developing its device. However, we believe the contrary to be true by the weight of credible evidence."

The Trial Judge in the *Ackermans* case also said:

> "To conclude: we do not believe that the foregoing testimony is sufficient to overcome the testimony to which we have previously referred, namely, that to the effect that even assuming there was

> something confidential about Ackermans' disclosure to General Motors, nevertheless, the weight of that testimony seems to be clearly to the effect that what Ackermans divulged was not, in fact, relied upon in the development of the General Motors device."

In both the *Ackermans* and the *Hoeltke* cases the failure to require a higher degree of proof was held by the Court of Appeals for the Fourth Circuit to be reversible error. This Court denied *certiorari* in both cases.

In the present case the holding by the Trial Judge that the "evidence preponderates in favor of the defendant" is held not to be reversible error. The Courts of Appeals in the Fourth and Ninth Circuits are therefore in irreconcilable conflict.

For further conflict consider the case of *Schreyer v. Casco Products Corp.*, 97 F. Supplement 159. There, the Trial Judge required of the defendant evidence beyond a reasonable doubt, quoting from the *Hoeltke* case as follows:

> " . . . '(O)ne who admittedly receives a disclosure from an inventor, proceeds thereafter to manufacture articles of similar character, and, when called to account, makes answer that he was using his own ideas and not the ideas imparted to him' should be required to sustain his defense with proof which is 'clear, satisfactory, and beyond a reasonable doubt', *Hoeltke v. C. M. Kemp Manufacturing Co.*, supra, at 923."

The rehearing opinion in the *Hoeltke* case was not even mentioned in the opinion of the Trial Judge.

If the "beyond a reasonable doubt" rule was "modified" as held by the Court of Appeals for the Ninth Circuit herein, then the Court of Appeals for the Second Circuit should have reversed the Trial Judge in *Schreyer v. Casco Products Corp.*, holding that the burden of proof imposed by the Trial Court, to wit, "beyond a reasonable doubt" was too severe. The Court of Appeals for the Second Circuit did not reverse; it affirmed (190 Fed. (2nd) 921). This Court denied *certiorari* 342 U. S. 913.

Consequently, as the burden of proof imposed on the defendant here is something less than "beyond a reasonable doubt" the decision of the Court of Appeals for the Ninth Circuit herein is in irreconcilable conflict with *Schreyer v. Casco Products Corp.*

These conflicts should be resolved by this Court. The law should not have one rule in one part of the United States and another rule in the Ninth Circuit. Inventors and composers should be assured that they may submit their ideas to persons having the means and the ability to exploit them anywhere in the United States, and the Courts will protect their confidential disclosures against theft by the disclosees by requiring the disclosees to prove their defense of prior conception by evidence that is "clear, satisfactory and beyond a reasonable doubt."

3. THERE IS CONFLICT BETWEEN THE DECISIONS OF THE TRIAL COURT AND THE COURT OF APPEALS HEREIN AND THE DECISION DUPONT v. MASLAND, 244 U. S. 100.

Herein, the Trial Court ignored the fact that access by the defendant to the plaintiff's music was brought about by the defendant's own repeated solicitations. These created an implied confidential relationship and should have been the starting point for consideration rather than be ignored. As said by Mr. Justice Holmes in *Dupont v. Masland,,* 244 U. S. 100:

> "Therefore the starting point for the present matter is not property or due process of law, but that the defendant stood in confidential relations with the plaintiffs, or one of them."

Had the Trial Court considered this factor as a starting point it would have been forced to arrive at the same conclusion expressed in *Dupont v. Masland,* namely that

> " . . . the first thing to be made sure of is that the defendant shall not fraudulently abuse the trust reposed in him."

This is stated in the opinion to be the usual incident of confidential relations.

The only way any court can make *sure* that an intrusted defendant is not abusing his trust is to impose on him the requirement that he prove he is not abusing the trust by evidence "beyond a reasonable doubt."

The Court of Appeals herein by failing to require this highest degree of proof has not undertaken to make "sure" that the defendant has not fraudulently abused the trust reposed in him and therefore the Court of Appeals herein has not been acting harmoniously with this important decision of this Court.

4. THERE IS CONFLICT BETWEEN THE DECISION OF THE COURT OF APPEALS HEREIN AND OTHER CIRCUITS AS TO THE CONCLUSIVENESS OF A FINDING OF FACT UNDER RULE 52(a) WHERE SUCH FINDING IS INDUCED BY AN ERRONEOUS VIEW OF THE LAW.

Here, the Trial Court has found that despite access and similarity that there has been no copying by the defendant. This finding was induced by the erroneous view of the law that all that was necessary was for the Trial Court to determine in whose favor the evidence preponderated. Even this was determined by deciding whether or not it was necessary for the Trial Judge to hold *"all"* of the defendant's witnesses incredible.

This is not the law.

The Court of Appeals herein has recognized that it is not the law, but says that the law requiring proof "beyond a reasonable doubt" was "modified" by the statement on rehearing in *Hoeltke v. Kemp.*

However, instead of reversing the Lower Court for failure to require that the defendant carry the proper burden of proof the Court of Appeals, in effect, accepts the finding on a lesser showing, saying:

> "Since the finding involved the credibility of witnesses, and since it was supported by substantial evidence, it is conclusive upon appeal. Rule 52(a)."

Neither the Trial Court nor the Court of Appeals herein has required the defendant to prove his defense by evidence "beyond a reasonable doubt," or even to carry a "heavy burden."

A finding of fact induced by an erroneous view of the law is not conclusive on appeal. It is clearly erroneous. It should have no legitimate standing whatsoever on appeal. Such findings were not conclusive on appeal in either *Hoeltke v. Kemp* or *Ackermans v. General Motors.* To that extent the decision here is in conflict with the decisions of the Fourth Circuit as to the conclusiveness of a finding on appeal under Rule 52(a) where the Trial Court has been under the misapprehension that the circumstances of the case require merely proof by the defendant that preponderates in his favor but which is less than proof "beyond a reasonable doubt."

With respect to the conclusiveness of a finding under Rule 52(a) which has been induced by an erroneous view of the law, the Ninth Circuit is out of harmony with and in conflict with other circuits. See *Aetna Life Insurance Co. v. Kepler,* 116 F. (2d) 1, (C. C. A. 8):

> "Findings of fact of the court below to the extent that they are unsupported by substantial

evidence or are clearly against the weight of the evidence or *were induced by an erroneous view of the law are not binding upon this court.*" (Emphasis added.)

See also:

Skelly Oil Co. v. Holloway, 171 F. (2d) 670.

In *United States v. Armature Rewinding Company,* 124 F. (2d) 589 (C. C. A. 8), the Court said:

> "But if this ultimate finding is contrary to the evidentiary findings or is based upon a misapplication of the law to the evidentiary findings, it is not binding upon this court. *Helvering v. Johnson,* 104 F. 2d 140, 144, C. C. A. 8, and cases cited."

There has been no holding by any court in this case that the evidence is "clear, satisfactory and beyond a reasonable doubt" that the defendant has not abused the trust reposed in him by the plaintiff. Such findings as have been made have been induced by the Trial Court being under the erroneous impression that the law merely required a preponderance of evidence on behalf of the defendant. This is not the law. The finding made by the Trial Court consequently is not binding upon the Court of Appeals and should not be binding upon this Court under Rule 52(a). Reference to Rule 52(a) under the circumstances as presented here serves merely to gloss over the failure of the Trial Court to apply the proper rule of law, namely that the evidence submitted on behalf of the defendant shall

be "clear and satisfactory and beyond a reasonable doubt."

CONCLUSION

In analogous civil cases, such as patent cases, where the defense of prior invention is set up by the defendant, the rule of law is that the defense must be established by evidence that is "clear, satisfactory, and beyond a reasonable doubt." This high burden has not been imposed by any of the Patent Statutes. It stems from the *improbability* of the defendant or others having made the invention at an earlier date than the patentee.

In a patent case mere oral testimony to the effect that the witnesses at isolated times and places had merely heard the defendant accurately describe the invention at a date prior to the patentee's invention would be rejected.[5]

In the present case all that the defendant's witnesses testified to is that they individually heard the defendant play the accused music once or twice at isolated times and places when no one else was present but the witness and the defendant. No patent or copyright would be enforceable if it can be defeated by testimony of this character.

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[5]*Smith v. Hall*, 301 U. S. 216. "This oral testimony, if taken at its face value, would show that the Smith method was used in the Brooklyn incubator with eggs in staged incubation. But without corroboration, it is insufficient to establish prior use, (citing cases)."

For an extreme situation in patent cases where the testimony of witnesses concerning prior invention was rejected, see *American Bell Telephone v. People's Telephone,* 22 F. 309, where nearly two hundred witnesses were brought forward to testify to the defense and the alleged prior invention of the telephone by Drawbaugh. The Trial Judge refused to accept their testimony. This Court refused to disturb his ruling at 126 U. S. 1.

In *Mumm v. Decker & Sons,* 301 U. S. 168, Mr. Chief Justice Hughes said:

> ". . . The issue of the patent is enough to show, until the contrary appears, that all the conditions under which a discovery is patentable in accordance with the statutes have been met. Hence, the burden of proving want of novelty is upon him who avers it. *Walker on Patents,* sec. 116. Not only is the burden to make good this defense upon the party setting it up, but his burden is a heavy one, as it has been held that 'every reasonable doubt should be resolved against him.' (Citing cases.)"

In *Hoeltke v. Kemp,* Judge Parker could see no valid reason why a defense of prior invention by the defendant should not require proof beyond a reasonable doubt regardless of whether such proof was being used to defeat an issued patent for want of novelty or whether it was being used to deny the inference of piracy during the period of unjust enrichment between the date of the invited disclosure and the date of issuance of the patent, i.e., during the period when the plaintiff had no patent.

In establishing unjust enrichment during that period the same elements of access, similarity, and piracy had to be established by the plaintiff, the same as in a copyright infringement suit, as here. As access, in *Hoeltke v. Kemp,* was derived from an invited disclosure, and had been established, and similarity had also been established, the inference of piracy was so strong that "every reasonable doubt should be resolved against" the defendant who attempted to establish the defense of prior invention or prior composition. This is true regardless of whether the defendant is using this evidence to defeat an issued patent for want of novelty; to repel the inference of piracy of an unpatented invention in a suit for unjust enrichment; or to repel the inference of copying in a copyright infringement suit.

Here it is much more improbable that two composers would compose the same or highly similar music, than two inventors inventing the same invention. Music is a mode of expression in its purest form. Similar inventions, on the other hand, may be inspired by the same need or the presentation of the same problem. There is no need or problem that would induce musical expression to be in the same form.

But even if it be assumed, *arguendo,* that it is possible for two independent composers, Overman and Loesser, to compose the same or highly similar music by coincidence, it is most improbable that:

1) These two composers should meet and become acquainted with each other before either composition was published.

2) One of these composers would ask the other to submit some music for consideration and possible publication.

3) The invitation should be accepted.

4) The music submitted by Overman to Loesser should include a piece highly similar to the music Loesser claims he composed just three months before he met Overman, — neither piece having been published or having been previously made available to the other.

5) Loesser should return Overman's music without comment or complaint that what Overman had submitted was almost identical with music Loesser had previously composed.[6]

6) When Overman's claim was made known to Loesser by attorney Walter K. Olds that Loesser should not have made known his claimed defense of prior composition at that time. He did not. Instead, he remained silent. (R. 210.)

These improbabilities coupled with the improbability of such similar music being independently composed by two composers are so fantastic that the evidence should be "clear, satisfactory and beyond a reasonable doubt" before it should be accepted. This is necessary in order to make "sure" that the defendant is not abusing the trust Overman reposed in him and is not

[6]Failure to speak under analogous circumstances was regarded to be of particular significance in *Atlantic Works v. Brady*, 107 U. S. 192, 203.

foisting an incredible tale on an unduly credulous Trial Judge.

There is good reason for the rule requiring the defendant to carry the high burden of proving his defense "beyond a reasonable doubt" as is evidenced by the *Hoeltke, Ackermans,* and like cases cited herein, and the denials of *certiorari* therein by this Court. The Ninth Circuit Court of Appeals should not be permitted to throw doubt on the rule by saying the rule has been "modified" and at the same time affirm a decision of the Trial Judge who decided the case only on a mere preponderance of evidence. Even the Trial Judge's decision was induced by a hesitation on his part against holding *all* of the defendant's witnesses incredible. There is no other situation in the law where a defense affirmative in character can be maintained by parading a group of witnesses before the Trial Court and unless the Trial Court concludes that *"all"* of the witnesses are incredible he must rule for the defendant.

In order that the rule of law be settled and justice be done to plaintiff, the granting of this petition is respectfully urged.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1953
No. 446

ROBERT E. OVERMAN,

Petitioner,

vs.

FRANK LOESSER,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

In addition to the opinion of the District Court to which petitioner refers [R. 837-839] there were some comments by the District Judge, made in denying petitioner's motion for a new trial, which amplify and supplement his original opinion. [R. 839-843.]

The opinion of the Court of Appeals [R. 936] is reported in 205 F. 2d 521.

Jurisdiction.

The jurisdiction of this Court is properly invoked under 28 U. S. Code, sec. 1254(1).

Questions Presented.

1. When, in a case in which it is claimed that a copyrighted musical composition has been unauthorizedly copied by the defendant, there is substantial evidence which, if true, establishes that the defendant's composition was composed, reduced to writing, and performed on several occasions, one year or more before the plaintiff's copyrighted composition was composed, and that evidence is accepted as true by the District Judge who saw and heard the witnesses, should it be held that the District Court's finding of no copying is clearly erroneous?

2. Does evidence of the sort described above, accepted as true by the District Judge, satisfy the defendant's burden of establishing that he did not copy, by evidence which is "clear, satisfactory and beyond a reasonable doubt," assuming that to be the proper criterion of persuasion in the circumstances involved?

Statement of the Case.

The respondent Frank Loesser is a professional composer of music, who has written a large number of successful popular songs. [R. 223-224.] In the summer of 1942 it occurred to Loesser that the well-known card-player's phrase "I'd like to have you on a slow boat to China" might be made the basis of a song. As was his custom when such thoughts came to him, he made a written note of the idea and filed it with similar memoranda which he had made from time to time. The original note and the envelope in which it (and the other memoranda) had been kept were produced at the trial. [R. 287, 289, 754-755; Exs. A, G.]

In the early part of 1943, while on duty with the Air Force at Santa Ana, California, Loesser in his spare

time worked on the development of that phrase into a song. By January 1, 1944, when he left the Santa Ana post, Loesser had composed the first eight bars and accompanying lyrics of the song in the identical form in which it was ultimately published as "On A Slow Boat To China."[1] [R. 291-295.] During this period Loesser played and sang the number, to the extent that it had then been composed, for Milton DeLugg, a fellow soldier and himself a musician and composer. Both Loesser and DeLugg so testified below. [R. 296, 319-321.]

Loesser was separated from the service in September or early October, 1945. During the process of separation and for a short time thereafter he continued with his development of the "slow boat" theme. By the end of November, 1945, he had worked out the words and music of the song in their entirety and as they exist today.[2] [R. 296-298.]

Loesser then "dictated" the song to DeLugg, who was acting as his musical secretary. The dictation consisted of vocal and piano renditions of the composition by Loesser in DeLugg's presence. The latter transcribed what he saw and heard into a lead sheet or musical "sketch." This consisted of the musical notation of the full melody, exactly as played (except for the erroneous transcription of one D-note as a C) and an indication or "sketch" of the harmonic accompaniment. This dictation took place

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[1]So-called popular music almost invariably consists of sixteen bars repeated, as does "On a Slow Boat to China." By January 1, 1944, therefore, the accused song was already half composed.

[2]When published, a four-bar interlude was added. [R. 634.] No claim has ever been made that this addition was copied from petitioner's song.

in December, 1945; and the original manuscript thus produced was placed in evidence. [R. 299, 303-308, 322, 583-584, 755; Ex. H.] Both Loesser and DeLugg denied any copying from petitioner's song or any knowledge of its contents at any time prior to 1947. [R. 365, 588-589.]

From time to time in the latter part of 1945 and the early part of 1946 Loesser on various occasions played and sang "On A Slow Boat To China" for a number of people. Seven of these auditors—each one wholly disinterested, each one a professional musician or music publisher, and each one having a special or personal reason for remembering the occasion—testified to these renditions and to the fact that as then played and sung (one year or more *before* petitioner's song was composed) it was exactly or substantially identical with the song in its later published form. Six of these witnesses testified in person at the trial; the testimony of the seventh was produced by deposition. [R. 717-719; 591-601; 603-611; 464-468; 535-540; 614-615; 620-622; 633-636; 456-461; Ex. M.] In several instances the witnesses' recollection of dates was corroborated by business and employment records of corporations having no connection of any kind with the litigation. [Exs. Q, S, T, U, V.] None of these witnesses was impeached or contradicted.

The District Judge accepted this testimony as true. [R. 837-839, 843.] Accordingly, he found as facts that Loesser's song was composed in November, 1945; that the petitioner's work was not composed until September or October, 1946, and was not submitted to Loesser until January 27, 1947; and that Loesser did not copy any part of "On A Slow Boat To China" from petitioner's song. [R. 13-15.] Furthermore, in denying a motion for new

trial (in support of which it was vigorously argued for the first time in the cause, that Loesser had not carried his burden of establishing prior conception by evidence that was "clear and satisfactory or beyond a reasonable doubt" [R. 18, 19]) the District Judge declared unequivocally that he was *"convinced"* by the evidence, to which we have referred, that Loesser's song had been composed long before petitioner's. [R. 843.]

The Court of Appeals affirmed. It held, as contended for by petitioner, that the rule of burden of proof announced in *Hoeltke v. C. M. Kemp Mfg. Co.*, 4 Cir., 80 F. 2d 912, *certiorari denied*, 298 U. S. 673, was applicable; but that the burden thus cast on the defendant had been successfully carried by evidence "which if believed would make a finding of copying untenable . . ." Therefore, the Court concluded, since that evidence was believed by the trial court, the finding of no copying based thereon, involving, as it did, the credibility of witnesses, and which was supported by substantial evidence, was conclusive on appeal.[3] [R. 939-940, 941-942.]

In that holding, we submit, there was neither error nor conflict with any applicable decision.

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[3]Since both the District Court and the Court of Appeals considered the evidence in the light of the standard of persuasion for which petitioner argues and held that there had been no copying, the evidence relating to the supposed relation of trust and confidence between petitioner and Loesser becomes immaterial. Even in petitioner's view of the law the only significance of that relationship is that procedurally it serves to impose on the defendant a more onerous burden of proof than might otherwise have been his, and that substantively, it subjects the latter to liability if he unauthorizedly makes use of the disclosed information. Accordingly, we do not extend this brief by a summary of that evidence or a correction of petitioner's statement of it. [But see, Note 8, *infra*.]

Argument.

1. The evidence to which reference has been made, if true, conclusively establishes that Loesser's song was composed many months before petitioner's number was in existence. On the indicated assumption of truth, it is obvious that the defense of prior conception was established, not only beyond reasonable doubt, but beyond any doubt whatever. Thus it is at once apparent that the basic, in fact the only, question before the District Court was whether the nine witnesses who gave that testimony spoke the truth. The District Judge, having the advantage of seeing and hearing the witnesses, found that they had testified truthfully. There can be no doubt that the rule in those circumstances is, in the words of Mr. Justice Holmes, "that so far as the finding of the master or judge who saw the witnesses 'depends upon . . . the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.' . . ."[4] [*Adamson v. Gilliland,* 242 U. S. 350, 353, 61 L. ed. 356, 37 S. Ct. 169. To the same effect: *Alabama Power Co. v. Ickes,* 302 U. S. 464, 477, 82 L. ed. 374, 377, 585 S. Ct. 303; *United States v. Aluminum Co. of America,* 2 Cir., 148 F. 2d 416, 433; *Wittmayer v. United States,* 9 Cir., 118 F. 2d 808, 811. And see, *United States v. Oregon Medical Society,* 343 U. S. 326, 339, 96 L. ed. 978, 988, 72 S. Ct. 690.]

That is the rule whether the burden of proof or standard of persuasion be a "preponderance of the evidence,"

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[4]While this rule was formulated under the old equity practice it is equally applicable now, since F. R. C. P. rule 52(a) perpetuated that practice. [*United States v. U. S. Gypsum Co.,* 333 U. S. 364, 394-395, 92 L. ed. 746, 765-766, 68 S. Ct. 525.]

or "clear and satisfactory evidence," or "proof beyond a reasonable doubt." In any case, and regardless of which burden applies, the question whether the evidence comes up to the required standard is one for the trial court. On review, the only question is whether the evidence, accepted as true below, supports the finding based thereon. That is just as much the rule in that rare type of civil case in which the reasonable doubt burden is imposed [*Waterloo Register Co. v. Atherton,* 9 Cir., 38 F. 2d 75, 76; *Becker v. Electric Service etc. Co.,* 7 Cir., 98 F. 2d 366, 368; *Twyman v. Radiant Glass Co.,* 8 Cir., 56 F. 2d 119, 120] as it is in criminal cases in which it is the usual criterion. [*Glasser v. United States,* 315 U. S. 60, 80, 86 L. ed. 680, 704, 62 S. Ct. 454, 469; *Moore v. United States,* 150 U. S. 57, 61-62, 37 L. ed. 996, 14 S. Ct. 26; *United States v. Manton,* 2 Cir., 107 F. 2d 834, 839, *certiorari denied,* 309 U. S. 664, and cases there cited; *Craig v. United States,* 9 Cir., 81 F. 2d 816, 827, *certiorari denied,* 298 U. S. 690; *Noell v. United States,* 9 Cir., 183 F. 2d 334, 336, *certiorari denied,* 340 U. S. 921; *CO-Two Fire Equipment Co. v. United States,* 9 Cir., 197 F. 2d 489, 491, *certiorari denied,* 344 U. S. 892 (jury waived).] It is also the rule in those cases in which the burden is not so severe as reasonable doubt but more stringent than mere preponderance, *e.g.,* "clear and satisfactory" evidence or a "heavy" burden. [*Carr v. Yokohama Specie Bank,* 9 Cir., 200 F. 2d 251, 255; *Lorenz v. Colgate-Palmolive-Peet Co.,* 3 Cir., 167 F. 2d 423, 425.]

It follows that specification of the particular criterion which is applicable in the instant cause is unnecessary and immaterial. The found truthfulness of the evidence of prior conception established that fact beyond any possible

question and thus satisfied even the most onerous burden of proof known to the law.

2. In point of fact, both the District Court and the Court of Appeals applied the standard for which petitioner argues. As has been seen, the contention that the defendant was required to prove prior conception beyond a reasonable doubt was belatedly advanced to the District Judge who nevertheless pronounced himself "convinced." [R. 19-20, 843.]

The Court of Appeals, stating that the dictum of *Hoeltke v. C. M. Kemp Mfg. Co., supra,* 80 F. 2d 912, was applicable, as petitioner contended, ruled that the evidence favorable to Loesser, if true, met the requirements of that rule; and that it was for the trial court who saw the witnesses, not the Court of Appeals to determine whether it was true.[5] [R. 939-942.] That disposition of the matter squares not only with *Hoeltke* but with all of the cases on scope of appellate review. [See, F. R. C. P., Rule 52(a).]

3. The Court of Appeals did not misconstrue or raise a conflict with the *Hoeltke* case. The original opinion in the latter case must certainly be read together with and as supplemented or modified by the opinion rendered in denying a rehearing. The Court of Appeals so read it in the instant cause; and so read it is clear that what was held in *Hoeltke* was only that unsupported testimony of *interested* witnesses, inconsistent with other established

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[5]Actually, the Court did not apply the reasonable doubt or heavy burden rule in *Hoeltke*. What was there decided, as distinguished from discussed, was that the evidence even by ordinary civil standards, was insufficient to support the finding of independent conception. [80 F. 2d at 923-924.]

or conceded facts, is not enough to carry the burden of proof imposed in cases of the sort there involved.[6] [See, note 5, *supra.*]

That this was a correct reading of *Hoeltke* is shown by the subsequent history of the decision in the same court which decided it. In *Chesapeake & O. Ry. Co. v. Kaltenbach,* 4 Cir., 95 F. 2d 801, 806, in an opinion in which Judge Parker, the author of the *Hoeltke* opinions concurred, only the rehearing opinion (in which the burden was said to be a "heavy one") was quoted. That quotation was introduced with the comment that it was a "*full* discussion" of the question. [Italics ours.] In *Ackermans v. General Motors Corp.,* 4 Cir., 202 F. 2d 642, 646, Judge Parker, apparently weighing the evidence *de novo,* concluded that the testimony of independent conception given by the defendant's *employees* was not convincing because the employees worked along lines laid out for them by the defendant; and because a particular employee, who was an alleged co-inventor of defendant's device and had knowledge of plaintiff's invention, was in court but was not called to testify that his work on the invention was independent of plaintiff's conception. In support of that holding Judge Parker quoted from both

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[6]In the case at bar the testimony of the interested witness was supported by the testimony of eight *disinterested* witnesses who, in turn, were corroborated in important particulars by business and employment records of disinterested concerns; and none of that evidence was inconsistent with any other fact in the record. [*Cf., Baker v. Dean,* 9 Cir., 80 F. 2d 658, 659; *Rown v. Brake Testing etc. Corp.,* 9 Cir., 38 F. 2d 220, 224; *Waterloo Register Co. v. Atherton, supra,* 38 F. 2d at 76; *Becker v. Electric Service etc. Co., supra,* 98 F. 2d at 368.] This substantially different factual situation, even when tested, as it was, by *Hoeltke* standards, required a different conclusion as to the sufficiency of the evidence to support the finding which was made in the trial court.

of his *Hoeltke* opinions, thus clearly indicating that the two must be read together.

Apart from the instant case, these decisions by the same court which decided *Hoeltke,* are the only appellate decisions citing the latter to the point here under discussion. The Court of Appeals did no more at bar with *Hoeltke* than its authors had already done with it.

4. At pages 12-13 of the petition a number of cases are listed as having cited *Hoeltke;* and, while the petitioner does not say so expressly, he obviously seeks to convey the impression that these citations were in support of the proposition that prior conception must be shown beyond a reasonable doubt. The fact is that in every instance given (aside from the two decisions just discussed), *Hoeltke* was *not* cited for that or any similar proposition, but for another point entirely.[7] Obviously there is no room in that treatment of the decision for any claim of a conflict among the circuits in respect of the *question raised at bar.*

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[7]For a typical example take *Eckert v. Braun,* 7 Cir., 155 F. 2d 517, 519, which petitioner lists as holding "that the cases are uniform on the point," presumably, the burden of proof point. What was actually said in that case follows:

> "The cases are uniform in holding that 'where, in advance of the granting of a patent, an invention is disclosed to one who, in breach of the confidence thus reposed, manufactures and sells articles embodying the invention, such person shall be held liable for the profits and damages resulting therefrom, *not under the patent statutes* but upon the principle that equity will not permit one to unjustly enrich himself at the expense of another,' Hoeltke v. Kemp Mfg. Co., 4 Cir., 80 F. 2d 912, 923, Chesapeake & O. R. Co. v. Kaltenbach, 4 Cir., 95 F. 2d 801, Saco-Lowell Shops v. Reynolds, 4 Cir., 141 F. 2d 587. . . ." [Court's italics.]

5. Questions of "access" and "similarity" are wholly immaterial in view of the finding that there was no *copying*. A copyright does not secure to an author or composer a monopoly in his conception or result; it gives to him, for a limited term, no more than the right to prevent others from *copying* his work. [*Arnstein v. Edw. B. Marks Music Corp.*, 2 Cir., 82 F. 2d 275; *Nutt v. National Institute*, 2 Cir., 31 F. 2d 236, 237; *Harold Lloyd Corp. v. Witwer*, 9 Cir., 65 F. 2d 1, 4, *appeal dismissed*, 292 U. S. 669; *Ricker v. General Elec. Co.*, 2 Cir., 162 F. 2d 141, 142.] The function of evidence of access and similarity in a copyright infringement case is to furnish the premise from which an inference of copying may be drawn. Such an inference is never compelled, and like any inference, may be negated by other evidence. [*Darrell v. Joe Morris Music Co.*, 2 Cir., 113 F. 2d 80; *Arnstein v. Edw. B. Marks Music Corp., supra*, 82 F. 2d 275; *Kustoff v. Chaplin*, 9 Cir., 120 F. 2d 551, 560.] When the evidence opposed to the inference is believed by the trial judge to be true and a finding is made conformably to that determination, the situation on appeal is only the familiar one of conflicting evidence resolved one way rather than the other. [*United States v. Yellow Cab Co.*, 338 U. S. 338, 341-342, 94 L. ed. 150, 153, 70 S. Ct. 177; *United States v. National Ass'n of Real Estate Boards*, 339 U. S. 485, 495-496, 94 L. ed. 1007, 1016, 70 S. Ct. 711; *Graver Tank Co. v. Linde Air Products Co.*, 339 U. S. 605, 609-610, 94 L. ed. 1097, 1103, 70 S. Ct. 854.]

6. Similarly, the finding of no copying rendered immaterial the question whether a confidential relationship existed between the parties.[8] [Pet. 22-23.] That relationship became of significance, in relation to the substantive rights of the petitioner, only if it was abused by the defendant, *i.e.*, if the composition claimed to have been confidentially disclosed to the latter was unauthorizedly appropriated by him. Since, as the District Court found, it was not appropriated at all, the issue of confidential relationship *vel non* necessarily dropped out of the case. [*Swan Carburetor Co. v. Nash,* 4 Cir., 133 F. 2d 562, 566-567.]

7. The argument for public importance seems to be that it is essential for authors and composers to be able to submit their works to prospective publishers without fear of having their compositions misappropriated. [Pet. 11.] That proposition may be granted without thereby giving to the case at bar any attribute of public significance. Nothing in the decision of the Court of Appeals affects in the slightest the protection which the law now offers to persons situated as was petitioner. Rights secured by statutory copyright are in no wise impaired;

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[8]At least a doubt may be expressed as to whether a casual and obviously conversation-making suggestion from a chance acquaintance that petitioner might submit his work to Loesser, as was the situation at bar [*e.g.,* R. 89-91, 96, 141, 147-148], was enough to create the relationship. [See, *Robins v. Hope,* 57 Cal. 493, 496-497; *Bacon v. Soule,* 19 Cal. App. 428, 434, 436-437, 126 Pac. 384, 386-387; *Herbert v. Lankershim,* 9 Cal. 2d 409, 483-484, 71 P. 2d 220, 257; Restatement, *Restitution,* sec. 182, comment c.]

nor is there any narrowing of a misappropriator's liability which may arise from contractual or fiduciary relationships. All that has been held is that when a claim of such misappropriation is made, a finding of fact to the contrary will not be disturbed on appeal if it is supported by substantial evidence believed to be true by the trier of the fact, who saw and heard the witnesses. Certainly, the desirability, even the necessity, of protecting authors and composers does not require that ordinary and long-established principles of appellate review must be overturned. Much less does it require that defendants be held to a standard of proof which in practice would make it impossible ever to establish that their work was their own.[9] [*Cf., Rown v. Brake Testing etc. Corp., supra,* 38 F. 2d at 224, stating that if courts could disregard credible, unimpeached testimony of prior conception in patent cases the statutory provision for such a defense would be nullified by "exacting an impossible standard of evidence . . ."]

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[9]It is important to note that in cases, such as *Hoeltke,* in which a heavy burden is placed on the defendant to prove independent conception, the defendant's composition or invention admittedly did not come into being until *after* the plaintiff's work had been disclosed. In such circumstances, there can be seen some reason for requiring a strong showing that the defendant's mental processes were not influenced by that which had been previously disclosed and of which, it must be assumed, he was aware while doing his own work. In the instant case, however, the whole point of the defense was that the defendant's composition came *before* any disclosure and, therefore, could not have been influenced by it.

Conclusion.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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